UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MOHAMAD IBRAHIM SHNEWER	:	**Honorable Robert B. Kugler**
	:	**Civil No. 13-3769 (RBK)**
	:	**Crim. No. 07-459 (RBK)**
v.	:	
	:	
UNITED STATES OF AMERICA	:	

UNITED STATES' ANSWER TO MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE §2255 MOTION

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Procedural History of This Case

On December 22, 2008, a jury sitting in Camden, New Jersey convicted Petitioner Mohamad Ibrahim Shnewer, along with his four codefendants, Serdar Tatar and brothers Dritan, Eljvir, and Shain Duka of conspiracy to murder uniformed members of the United States armed services, in violation of 18 U.S.C. § 1117. The jury also convicted Shnewer, Dritan Duka and Shain Duka of possession and attempted possession of firearms in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Counts 3 and 4), convicted Dritan Duka and Shain Duka of unlawful possession of machine guns, in violation of 18 U.S.C. § 924(o) (Count 5), and convicted the three Dukas of unlawful possession of firearms by illegal aliens, in violation of 18 U.S.C. § 922(g)(5)(A) (Counts 6 and 7). The jury acquitted all five defendants of the Count Two charge of attempted murder of American soldiers. United States v. Shnewer et al., Dist. Ct. 07-cr-459; Docket 371.

After denying post-verdict motions, this Court imposed life sentences for the conspiracy convictions on Shnewer and the three Dukas, and sentenced Tatar to 396 months imprisonment. The Court imposed additional sentences on the firearms convictions for Shnewer and the Dukas. Docket 417, 419, 421, 425, 426.

On direct appeal, the Third Circuit, on December 28, 2011, vacated Shnewer's conviction on Count 4 based on the Government's concession that the count was defective. Docket 466. The Court of Appeals affirmed in all other respects. United States v. Duka, 671 F.3d 329 (3d Cir. 2011). On February 16, 2012, this Court vacated Shnewer's conviction and sentence on Count 4. Docket 467. On June 11, 2012, the Supreme Court denied Shnewer's motion for a writ of certiorari. 132 S.Ct. 2756, Supreme Court Docket No. 11-10235.[1]

Each of the Petitioners has now filed pro se motions for relief pursuant to 28 U.S.C. § 2255, which have been docketed by this Court as shown in the caption to this motion.[2] By order dated October 30, 2013, this Court directed the Government to file its response to

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 establishes a one-year statute of limitations period for § 2255 motions, "running from the latest of" four specified dates. 28 U.S.C. § 2255(f). Here, the limitations period began when "the judgment of conviction bec[a]me[] final." Id. As applicable here, a "judgment of conviction becomes final" under § 2255 on the date when the Supreme Court denies the defendant's timely filed petition for certiorari. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999).

Consequently, the deadline for Shnewer's § 2255 petition was June 11, 2013. Shnewer certified that the petition was placed in the prison mailing system on June 7, 2013. See Petition at p. 15. A pro se § 2255 petition is considered filed when placed in the prison mailing system. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Rule 3(d), Federal Rules Pertaining to Section 2255 Proceedings. Absent proof that Shnewer's certification that he mailed the petition on June 7 is incorrect, the petition was evidently timely filed.

[2] The Dukas have jointly retained counsel, Robert J. Boyle, Esq., to represent them with respect to their § 2255 petitions. By order dated October 25, 2013, this Court directed attorney Boyle to file, by January 27, 2014, a memorandum of law in support of the Dukas' respective § 2255 petitions. Mr. Boyle has recently moved this Court to extend the deadline to February 17, 2014.

Shnewer's pro se § 2255 motion by December 14, 2013. As that date falls on a Saturday, the revised deadline is Monday, December 16.

Answer to Shnewer's Motion

Ground One

> The sentencing court did not give rational and meaningful consideration to one of the § 3553(a) factors, namely, the need to avoid unwarranted sentencing disparity, and Movant's attorney was ineffective in failing to properly address this factor at sentencing or object to the court's failure to address it.

Answer: The United States denies that this Court failed to give rational and meaningful consideration to the need to avoid unwarranted sentencing disparity, as required by 18 U.S.C. § 3553(a)(6). To the contrary, the Court expressly addressed this factor at sentencing. See April 29, 2009 Shnewer Sent. Tr. 51.

Although Shnewer identifies in his motion several cases from other federal judicial districts in which a defendant who was supposedly convicted of similar crimes received a lower sentence, he provides no information about any of those cases regarding their relevant similarities, particularly with respect to the nature of the offense conduct and the criminal record of the defendants, to this case. Without additional information, Shnewer cannot possibly establish that the Court imposed a sentence that was unreasonably disparate with those of similarly situated offenders, and that former counsel was ineffective for failing to allege such an error.

Ground Two

> The sentencing court based its sentence of Movant in part on a constitutionally impermissible factor, Movant's religious beliefs, and his attorney was ineffective in failing to object or raise the issue in direct appeal.

Answer: The United States denies that this Court based any part of Shnewer’s sentence on the Court’s supposedly biased view of Shnewer’s Muslim faith. The United States also denies that this Court ever suggested, implicitly or otherwise, any bias or animosity against persons of the Muslim faith.

Because this Court did not engage in any discrimination against Shnewer based on his religion, former defense counsel could not have been ineffective for declining to raise a meritless objection on this ground. Nor will Shnewer be able to show that, had former defense counsel objected to this supposed error, Shnewer would have received a lower sentence than he actually received. Consequently, Shnewer will be unable to meet either prong of his burden to prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

Ground Three

> Trial counsel was ineffective in failing to communicate a plea offer to Movant, or, if there was no formal plea offer, counsel was ineffective in failing to pursue plea discussions with the prosecution when he learned prosecutors were amenable to such

discussions.

Answer: As shown in the attached declaration of First Assistant United States Attorney William E. Fitzpatrick, the United States denies that it ever offered Shnewer a proposed guilty plea agreement that would have resulted in the imposition of a sentence shorter than life imprisonment. As also shown in that declaration, the United States further denies that it was "amenable" to plea negotiations that would have resulted in a sentence for Shnewer of less than life imprisonment.

Accordingly, former defense counsel could not have been ineffective for failing to convey this non-existent offer to Shnewer. Nor did Shnewer have any right to such an offer. Shnewer will also be unable to meet his burden of proving that he was affirmatively prejudiced based on this claim of alleged ineffective assistance.

Memorandum of Law in Support of Motion To Dismiss the Motion

This Court Should Dismiss the Motion Without A Hearing.

A district court has discretion to decide whether to hold an evidentiary hearing on a § 2255 application. See Gov't of the V.I. v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the court must first determine whether the petitioner's claims, if proven, would entitle him to relief, and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 (3d Cir. 1991). Accordingly, a district court may summarily dismiss a § 2255 application without a hearing where the "motion, files, and records show conclusively that the movant is not entitled to relief.'" United States v. Nahodil, 36 F.3d 323, 326 (3d Cir.1994) (quoting United States v. Day, 969 F.2d 39, 41–42 (3d Cir. 1992)). See Rule 4(b), Federal Rules Governing Section 2255 Proceedings.

As will be shown herein, the "motion, files, and records 'show conclusively that" Shnewer "is not entitled to relief" on any of the three claims presented in his § 2255 motion. Although Shnewer purports to incorporate by reference other claims raised by his codefendants in their separate § 2255 motions, there is no authority permitting him to do so. If he wishes to press any claims other then three that are specifically articulated in his motion, he should file an amended motion within 21 days of the service of this responsive pleading.

1. Shnewer's Formidable Burden for Obtaining Ineffectiveness Relief under 28 U.S.C. § 2255.

Relief under 28 U.S.C. § 2255 is not available to correct errors that could have been raised at trial or on direct appeal, United States v. Essig, 10 F.3d 968, 979 (3d Cir. 1993)), as such claims are "procedurally barred." United States v. Jenkins, 333 F.3d 151, 155 (3d Cir. 2003); see also Hodge v. United States, 554 F.3d 372, 379 (3d Cir. 2009) ("Put differently, a movant has procedurally defaulted all claims that he neglected to raise on direct appeal."). However, "courts will exempt a movant from [the procedural default rule] if he can prove ... that there is a valid cause for the default, as well as prejudice resulting from the default." Hodge, 554 F.3d at 379. Ineffective assistance of counsel claims that, if proven, would rise to the level of Sixth Amendment violations, constitute sufficient cause to excuse procedural default. Id. (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991) and Wise v. Fulcomer, 958 F.2d 30, 34 n.9 (3d Cir.1992)).

A defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 464 U.S. 668, 686, 694 (1984). "[T]he burden to 'show that counsel's performance was deficient rests squarely on the defendant." Burt v. Titlow, 134 S.Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 687). In determining whether counsel's conduct was deficient, the court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688–89.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697; see also United States v. Gray, 878 F.2d 702, 710 (3d Cir.1989) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). "Therefore, failure to satisfy either prong of the Strickland analysis is grounds for dismissal." Giblin v. United States, 2010 WL 3039992, *6 (D.N.J. 2010) (Kugler, J.).

Regarding the "deficient" prong, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, assessing the facts of the case at the time of counsel's conduct. Strickland, 466 U.S. at 688–89 ("the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"); Jacobs v. Horn, 395 F.3d 92, 102 (3d Cir.2005). Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 688. The Supreme Court recently reiterated that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'" Burt v. Titlow, 134 S.Ct. at 17 (quoting Strickland, 466 U.S. at 690). Moreover, "[i]t should go without saying that the absence of evidence [of counsel's unreasonableness] cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" Id.

As for the prejudice prong, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

2. Shnewer's Three Ineffectiveness Claims Should Be Dismissed.

Shnewer raises three claims of ineffective assistance of former counsel. According to Shnewer, former counsel allegedly failed to:

- object to this Court's court's supposed failure to properly consider the sentencing factor set forth in 18 U.S.C. § 3553(a)(6), the avoidance of unwarranted disparities among defendants with similar records who have been found guilty of similar conduct, and failed to argue that a sentence of life imprisonment was unduly disparate to those of similarly situated defendants;

- object to this Court's imposition of a sentence that was supposedly infected by the Court's bias against Shnewer's practice of the Muslim faith; and

- failed to convey to Shnewer the Government's supposed offer of a guilty plea agreement that would have spared Shnewer a life sentence, and failed to engage in plea negotiations that would have resulted in the offer of such a guilty plea proposal.

To the contrary, the present record reveals that this Court properly considered the need to avoid unwarranted sentencing disparities among similarly situated defendants. Second, the present record provides no support for the notion that this Court increased the length of Shnewer's sentence because of his practice of the Muslim faith. Finally, as demonstrated by the attached declaration of First Assistant United States Attorney William E. Fitzpatrick, the Government never offered Shnewer a guilty plea proposal that would have spared him from a sentence of life imprisonment, and would not have entered into such an agreement. Consequently, former counsel could not have been ineffective in any of the manners alleged by Shnewer.

a. **This Court Should Dismiss Shnewer's Claim That The Court Failed to Give Adequate Consideration To the Need To Avoid Disparate Sentences, and That Former Counsel Was Ineffective For Not Raising That Claim.**

"To be procedurally reasonable, a sentence must reflect a district court's meaningful consideration of the factors set forth at 18 U.S.C. § 3553(a)." United States v. Lessner, 498 F.3d 185, 203 (3d Cir. 2007). Among those factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). "A sentencing court need not make findings as to each factor if the record otherwise makes clear that the court took the factors into account." Id. "There are no magic words that a district judge must invoke when sentencing, but the record should demonstrate that the court considered the § 3553(a) factors." United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006).

A sentencing court must consider the need to avoid sentencing disparities at the national level, and not by comparison to sentences imposed upon coconspirators or codefendants. See United States v. Parker, 462 F.3d 273, 276 (3d Cir. 2006). Because "[s]entencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly," "[a] sentence within a properly ascertained range [] cannot be treated as unreasonable by reference to § 3553(a)(6)." United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006). Accord, United States v. Willingham, 497 F.3d 541, 545 (5th Cir. 2007). As Shnewer tacitly concedes, his life sentence was within the applicable Guidelines range (life imprisonment from top to bottom of the range) for a person with his total offense level of 51 and his criminal history category of VI. See U.S.S.G. Chapter Five, Sentencing Table.

This Court acknowledged the requirement to avoid unwarranted sentencing disparities, but explained that "disparity is really not an issue in this case," Shnewer Sent. Tr. at 51. A sentencing court has abundant discretion to determine the weight to be assigned to each of the factors under 18 U.S.C. § 3553(a) in a particular case. See United States v. Bungar, 478 F.3d 540, 546 (3d Cir. 2007).

Shnewer's claim fails on multiple grounds. First, he provided sufficient information to show any relevant disparity. Rather, he merely cites the case names and docket numbers of several criminal cases in districts other than this one, claiming that supposedly similarly situated defendants in those case received lower sentences than he did. Motion at p. 6 (Ground One(a)). Without supplying any relevant information about those cases, he cannot meet his burden of showing any disparity between his sentence and the sentences in those cases. Consequently, Shnewer "has failed to explain how his sentence—one that fell within the Guidelines range—created any sentencing disparities." Giblin, 2010 WL 3039992, *18 ("Petitioner does not cite any examples of similarly situated defendants with whom the Court might have compared sentences").

And even if he did, that would hardly show that his sentence was "disparate" from the national consensus for such sentences. The analysis must proceed from an assessment of the broad consensus among all sentencing courts that have addressed similarly situated defendants. And such an assessment must isolate cases that are similarly situated in the particulars, including the relevant Guidelines enhancements and adjustments, and not merely cases involving the same criminal charges or base offense levels. See generally Batista v. United States, 2009 WL 235027, *2-3 (D.N.J. 2009) (rejecting § 2255 claim that sentence was unreasonably disparate compared to the "national averages for sentences," where petitioner failed to provide sufficient information about "details about the underlying sentences," because "[t]hese statistics fail to incorporate enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases") (citing United States v. Willingham, 497 F.3d 541, 545 (5th Cir. 2007) and United States v. Restrepo, 250 F. App'x 434, 435 (2d Cir. 2007) (not precedential)). A fortiori, this Court did not violate § 3553(a)(6) merely because it imposed a sentence that was higher than sentences in some other cherry picked cases, no matter how similarly situated the defendants in those other cases were.3

This Court's determination that avoiding a disparity should not factor strongly in the calculation of an appropriate sentence was entirely permissible. This Court permissibly deemed the seriousness of the offense, as reflected in the literally "off the chart" high offense level of 51, and Shnewer's maximum possible criminal history category of VI, as more significant concerns in the over-all

[3] In fact, the four cases identified in Shnewer's motion involved offenses that are substantially different from Shnewer's in several relevant respects. For instance, some of the defendants in those cases pleaded guilty, rather than proceeding to trial as Shnewer did. Some of the defendants were convicted for arms trafficking offenses rather than plotting to commit murder.

Shnewer also ignores other cases in which defendants involved in similar offenses also received sentences of life imprisonment. For instance, Richard Reid, the infamous "Shoe Bomber," pleaded guilty to attempted murder, placing an explosive device on an airliner, and other offenses. He was sentenced to three consecutive sentences of life imprisonment plus 130 years. See United States v. Richard Colvin Reid, U.S. District Court for the Dist. of Massachusetts, 02-10013.

balancing than considerations of disparity. The Court would have had to grant at least a nine offense level downward variance, to level 42, just to reach a Guidelines range that encompassed a sentence of less than life at the bottom of the range. See U.S.S.G., Chapter Five, Sentencing Table. Under those circumstances, this Court permissibly concluded that any disparity between a life sentence for Shnewer and a "national consensus" of the appropriate sentences for defendants who were similarly situated was warranted, not unwarranted.

Shnewer has also failed to sustain his burden of showing that counsel's sentencing advocacy was constitutionally deficient. Former counsel acted well within his professional discretion by declining to make what likely would have been a failed argument that Shnewer's sentence should be reduced below the Guidelines range to avoid a disparity. Rather, counsel vigorously urged the court to impose a custodial sentence of thirty-five years, arguing that Shnewer, who had no prior criminal history, a supportive family (his mother and sister testified at the sentencing hearing, as the Court will recall, Sent. Tr. 20-28), and a solid employment record could emerge from prison following a lengthy sentence as a rehabilitated person who would pose no threat to society. Sent Tr. 32-42. A defense attorney is not constitutionally ineffective at sentencing because he advances the most compelling arguments, rather than throwing in the kitchen sink. See generally Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000)(on appeal, "lawyers are clearly not incompetent when they refuse to follow a 'kitchen sink' approach to the issues"). This Court should dismiss this claim.

b. This Court Should Dismiss Shnewer's Claim That The Court Increased Shnewer's Sentence Because of His Muslim Faith.

Pointing solely at a remark of this Court at a codefendant's sentencing hearing that he has taken out of context, Shnewer contends that the Court unlawfully increased his sentence because of its supposed animus towards Islam. According to Shnewer, the Court imposed a more lenient sentence on Tatar than it imposed on Shnewer because of Shnewer's religious beliefs. This is a distortion of the Court's words and reasoning.

The court's complete remarks on the subject were as follows:

> I asked the government the question, what motivated this man [codefendant Tatar]. And it's the Government's position [that] it's religious fervor. And indeed he does say it, "I'm doing it in the name of Allah." But that's all he ever really says. That's the only time he ever invokes the name of the Lord. The only time he ever invokes a religious reason for doing any of this. And I'm not impressed with it.
>
> I know a lot of people who invoke the name of their God. Very religious people, and I come away with this, simply not convinced by a preponderance of the evidence that he was driven to do this by any ideology of hatred or any religious fervor.
>
> I am absolutely convinced that he was going through with this, he was going to help this, he would do what he can do and to make this happen. That they were going to kill

> American soldiers merely because of the status.
>
> But what drove him was not what drove the other four defendants In this case. And that makes a difference. It makes a big difference. Because he's the only one of these defendants who I have any hope of rehabilitating through a prison sentence. The others are so consumed with hatred and their ideology of theirs that they're never going to change. I'm not convinced the same is true of Mr. Tatar.

Tatar April 29, 2009 Sent. Tr. pp. 67-68.

Although a sentencing court may not impose a harsher sentence because of a defendant's religious beliefs, it is permitted to consider the defendant's likely future conduct. Specifically, the court is required the "consider the need for the sentence imposed" to, inter alia, "afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(1)(B) and to "protect the public from further crimes of the defendant," § 3553(a)(1)(C). Specific deterrence through protracted incarceration of a defendant who is likely to recidivate is the opposite side of the coin of reduced incarceration of a defendant who is unlikely to recidivate. If the sentencing court concludes that the chances for rehabilitation are poor and the likelihood of recidivism is high, then prolonged incarceration is justified to achieve specific deterrence.

After finding that Tatar's motivations for joining the conspiracy were not rooted in strong ideological hatred, the Court reasonably concluded that he was more amenable to rehabilitation than the other defendants, who were possessed by an ideology that appeared to be impervious to moderating influences. On the other hand, this Court acted well within its broad sentencing discretion, and did not clearly err, by concluding that Shnewer's rigid adherence to violent Islamic jihad substantially diminished the likelihood of his successful rehabilitation.

Moreover, "the sentencing authority has always been free to consider a wide range of relevant material." Dawson v. Delaware, 503 U.S. 159, 164 (1992)(citing Payne v. Tennessee, 501 U.S. 808, 820-821 (1991). See also United States v. Tucker, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"). Although "the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs," Dawson, 503 U.S. at 163, "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," id. at 165.

For instance, the Supreme Court has rejected a First Amendment challenge to a sentencing court's consideration of relevant evidence of a defendant's racial intolerance and subversive advocacy, including his desire to start a "race war." See Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion). The trial evidence here similarly showed Duka's willingness to participate in a war between Muslims and "infidels." See Government's Trial Exhibit 606B, p. 7, transcript of conversation on August 2, 2006, in which Shnewer stated "I love to kill Jews. I tell you this, in all honesty, that it is a dream of mine. . . . It is a dream of mine to kill Jews in my land (of Palestine).") Accord, United States v. Stewart, 65 F.3d 918, 930-932 (11th Cir. 1995) (in a prosecution for conspiracy to violate civil rights, the sentencing court permissibly considered the racial bigotry of defendant, the "Grand Dragon" of the Ku Klux Klan).

The fact that Shnewer's violent ideology was cloaked in religious belief did not place that fact off limits from the sentencing court's permissible consideration. In United States v. Yaghi, 2012 WL 147955 (E.D.N.C. 2012), defendant was convicted following trial for (1) conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A; and (2) conspiracy to murder, kidnap, maim and injure persons in a foreign country in violation of 18 U.S.C. § 956(a). The district court noted that the crimes were motivated by "a destructive ideology, cloaked in adherence to an extremist view of Islam, which propagated violence against anyone perceived as being in Muslim lands unjustly, coupled with his demonstrated disregard for the law." Id. at *4. This "underscore[d] this defendant's dangerousness." Id. "Defendant was ready, willing, and did so act to further violence," and "plunged himself for several years into radicalism." Id. The Court imposed concurrent sentences of 380 months for the two crimes, designed to "promote respect for the law, deter this type of conduct, and protect the public." Id.

To be sure, U.S.S.G. § 5H1.10 states that "religion," like "race, sex, national origin, and creed" are "not relevant in the determination of a sentence." But the purpose of that provision is to prevent sentencing judges from showing favoritism or animosity towards a defendant because of those characteristics. It does not prevent the sentencing court from considering any relevant evidence about religion.

For instance, in United States v. Gunderson, 211 F.3d 1088 (8th Cir. 2000), the district court did not violate § 5H1.10 when it pointed out the incongruity between the defendant's role as the head of a "Christian counseling service," and his offense. Those remarks "properly reflect[ed] the inconsistency between [defendant's] assumption of moral leadership with respect to his clients and his simultaneous commission of bankruptcy fraud." Id. at 1089. This was a permissible "inquiry into the degree of a defendant's blameworthiness," which "is entirely appropriate to the court's selection of a sentence within the guidelines range." Id.

Similarly, in United States v. Culbertson, 406 F. App'x 56 (7th Cir. 2010) (not precedential), the sentencing court did not violate § 5H1.10 when it told the defendant that she "come from a Catholic family and went through Catholic grade school, as I did" where she should have learned about "right and wrong." "[T]he district court [] did not rely on Culbertson's Catholicism to determine her sentence." Id. at 59.

Likewise here, this Court did not impose a harsher sentence on Shnewer because he was a Muslim as opposed to a Christian, Jew, or Buddhist. Rather, the Court appropriately considered a highly relevant factor of Shnewer's character, his eagerness to commit violent crimes in furtherance of an ideology that claimed Islam as its source.

Moreover, even if the present record leaves some ambiguity on this point, that can be easily remedied. This Court can lay to rest during the § 2255 proceedings any contention that in sentencing Shnewer, it was motivated by improper considerations of supposed religious bigotry rather than proper considerations of deterrence and rehabilitation.

c. This Court Should Dismiss Shnewer's Unsupported Claim That Former Counsel Was Ineffective For Supposedly Failing To Convey A Supposed Plea Offer From the Government to Shnewer.

Finally, this Court should also reject Shnewer's claim that former counsel was ineffective for failing to inform Shnewer of a supposed plea offer from the Government, or failing to secure a plea agreement that would have spared Shnewer a life sentence, an agreement to which the Government was supposedly receptive. "In order to establish that he was 'prejudiced' by the specific terms of his plea bargain, [a § 2255 petitioner] must provide some evidence that the Government was amenable to a deal that was more favorable to him." Kohlmiller v. United States, 2010 WL 3270753, *7 (W.D.Pa. 2010) ("A finding of ineffective assistance of counsel cannot be based on pure speculation that a better deal would have been offered by the Government").

Not only has Shnewer offered no such evidence by way of an affidavit or otherwise, his claim is false as a matter of fact. As shown in the declaration of First Assistant United States Attorney William Fitzpatrick, the lead prosecutor in this case, the Government never offered Shnewer such a plea agreement, never informed former counsel that it would offer such an agreement, and never negotiated with former counsel with an eye towards reaching such an agreement. As FAUSA Fitzpatrick explains, the Government was not willing to enter into a plea agreement with Shnewer that would have prevented this Court from imposing a sentence of less than life imprisonment. Nor would the Government have been willing to enter into a plea agreement that would have prevented it from advocating for a life sentence. "Counsel could not have been deficient in failing to pursue a Rule 11(c)(1)(C) plea agreement when no such agreement was offered by the Government." Giblin, 2010 WL 3039992, *15-16.

Nor was Shnewer entitled to a plea agreement that would have spared him from a life sentence. "[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." Weatherford v. Bursey, 429 U.S. 545, 561 (1977)).

At most, the Government would have offered Shnewer immunity from a charge of actual or attempted possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). That still would have left Shnewer subject to a life sentence for violation of 18 U.S.C. § 1117. See Fitzpatrick Declaration at ¶ 4. As it turns out, although Shnewer was convicted at trial of an attempt to violate § 924(c), that conviction was subsequently vacated by the Court of Appeals. Shnewer thus received no additional punishment beyond that he would have received had he entered into the most generous plea agreement that the Government might have offered. Consequently, he cannot show that he suffered any prejudice as a result of former counsel's failure to secure such an agreement.

Because Shnewer's claim is contradicted by the only evidence in the record that bears on his claim, the claim should be dismissed.[4]

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[4] Presently pending before the Court is the Government's motion for the Court to direct former counsel to meet with Government counsel and provide relevant information regarding Shnewer's claims, without invoking the attorney-client privilege or the work product doctrine. If the Court grants that motion, the Government will provide a declaration from former counsel on this point.

B. This Court Should Compel Shnewer to Specify With Particularity Any Additional Claims On Which He Seeks Relief, And Not Be Permitted to "Incorporate by Reference" All Claims Raised By All of His Codefendants.

Shnewer states that he "wishes to join in the claims of his codefendant's § 2255 motions, and incorporates them by reference." Motion, ¶13, 4. He fails to explain how he can meet his obligation to plead his § 2255 claims with specificity in this manner, and indeed, he may not.

Although a reviewing court "must construe the allegations in [a] pro se petition liberally, and [] not subject [such a] petition to the standards that [] would apply to pleadings drafted by lawyers, United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992), a movant under under § 2255 must plead his claims with a reasonable degree of specificity. See United States v. Stewart, 431 F. App'x 122, 124 (3d Cir. 2011) ("While Stewart did allege in his § 2255 petition that defense counsel gave him poor advice by advising him to plead guilty, his claim, without more, lacked sufficient specificity to be meritorious.") (not precedential); Saunders v. United States, 236 F.3d 950, 953 (8th Cir. 2001) ("While a pro se § 2255 petition might require the more liberal construction that a court would give pro se pleadings in any other civil case, Saunders's petition "lack[s] sufficient specificity under even the most liberal pleading requirements.") (citing Cooper v. Schriro, 189 F.3d 781, 785 (8th Cir.

1999)).

By failing to identify any particular claims raised by his codefendants that he also wishes to raise, Shnewer purports to preserve all of the claims that were raised by all of his codefendants. But some of those claims have no application to Shnewer's case. For instance, in his § 2255 motion, Dritan Duka has alleged that his attorney was ineffective for failing to argue that certain (unidentified) recorded conversations were admissible as bearing on Dritan Duka's supposedly non-culpable state of mind. Dritan Duka § 2255 Petition, Ground Two, ¶ iii. Dritan Duka also claims that his attorney was ineffective for failing to argue that the trial evidence was insufficient to prove that he was guilty of the charged conspiracy. Id., ¶ iv.

But even if there were recordings that might have demonstrated Dritan Duka's supposedly non-culpable state of mind, it does not follow that there were any recordings that would have demonstrated Shnewer's supposedly non-culpable state of mind. And because Shnewer and Dritan Duka did not act identically with respect to the conspiracy, and the evidence against them was not identical, it does not follow from the premise that the evidence was insufficient to convict Dritan Duka that it was also insufficient to convict Shnewer. Other claims raised by other codefendants likewise have no bearing on the constitutional validity of Shnewer's convictions and sentence.

Shnewer should not permitted to proceed on any claims other than those set forth in his own motion unless he timely files a motion to amend his motion adding those claims. Rule 12 of the Federal Rules Governing Section 2255 Cases in the United States District Courts states that

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Under the Federal Rules of Civil Procedure, a “party may amend its pleading once as a matter of course, [] if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading.” Fed. R. Civ. Pro. 15(a)(1)(B). This Court should enforce that rule and permit Shnewer to present only those claims that he pleads with specificity in a timely motion to amend the § 2255 motion.

Of course, even if Shnewer were to satisfy the 21-day deadline in Rule 15(a)(1)(B), he might not be able to present any new claims under § 2255 now that the one-year deadline under AEDPA has expired. Fed. R. Civ. P. 15(c)(1)(B) states that “[a]n amendment to a pleading relates back to the date of the original pleading when,” inter alia, “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading." Applying that principle, an amendment to a § 2255 motion will be deemed to relate back to the date of the original motion only if the original and amended motions "state claims that are tied to a common core of operative facts." Mayle v. Felix, 545 U.S. 644, 664 (2005); see also United States v. Thomas, 221 F.3d 430, 436 (3d Cir. 2000)("we hold that Rule 15(c)(2) applies to § 2255 motions insofar as a District Court may, in its discretion, permit an amendment to a motion to provide factual clarification or amplification after the expiration of the one-year period of limitations, as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief").

Most of the claims presented by Shnewer's codefendants are not "tied to a common core of operative facts" that apply to the three claims that Shnewer has presented. If and when Shnewer elects to file a timely motion to amend his § 2255 motion, the Court can determine if any new claims can properly relate back to the three present claims.

Conclusion.

For the foregoing reasons, the United States respectfully requests that this Court dismiss Shnewer's motion in its entirety and deny a certificate of appealability as to those claims.

Respectfully submitted,

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Date: December 16, 2013
Camden, New Jersey

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I served the attached United States' Answer To Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence And Memorandum Of Law In Support Of Motion To Dismiss The §2255 on:

Mohamad Shnewer, pro se
BOP No. 61283-066
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By certified United States Mail, return receipt requested

/s/ Norman Gross
By: Assistant U.S. Attorney